Filed 10/23/20 Bellino v. Judge CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAMES BELLINO et al.,	
Plaintiffs and Appellants,	G057450
v.	(Super. Ct. No. 30-2018-01008497)
TAMRA JUDGE,	O P I N I O N
Defendant and Appellant.	

Appeal from an order of the Superior Court of Orange County, Layne H. Melzer, Judge. Affirmed.

Brown, Neri, Smith & Khan and Geoffrey A. Neri for Plaintiffs and Appellants.

Pine Tillett Pine, Norman Pine, Scott Tillett, and R. Chris Lim; A.G. Assanti & Associates and Allesandro G. Assanti for Defendant and Appellant.

Tamra Judge and Shannon Beador, cast members of the nationally televised reality show the "Real Housewives of Orange County" (RHOC), appeared on a gossip podcast. During the podcast, Judge and Beador made comments about James Bellino, the ex-husband of Judge's former RHOC castmate. Bellino and his company, Jump Management Co., LLC (JMCO) (collectively referred to as Plaintiffs), sued the women for defamation and other related claims.

Judge filed a special motion to strike the first, second, and fourth claims in the complaint pursuant to Code of Civil Procedure section 425.16 (anti-SLAPP motion).[1] The trial court granted Judge's anti-SLAPP motion as to the second claim on the grounds it was for defamation per quod and Bellino did not present adequate evidence of special damages. The court denied the anti-SLAPP motion as to the first and fourth claims for defamation and false light, determining Bellino demonstrated a probability of prevailing on the merits. Judge appealed from that order. Bellino filed a cross-appeal, asserting the trial court erroneously concluded Judge met her burden on the first prong as to the first and fourth claims and Bellino failed to adequately support his second claim for defamation with evidence of special damages. We affirm the court's order.

FACTS

I. *Factual Background*

RHOC premiered in 2006. It documents and dramatizes the lives of an ensemble cast of women living in Orange County, California. Judge has been a RHOC cast member since 2007. Beador has been a cast member since 2014.

Bellino is a businessperson and entrepreneur. He is the managing member of JMCO. Bellino's ex-wife Alexis Bellino[2] was a cast member of RHOC from 2008 to

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[1] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

[2] We refer to Alexis by her first name for ease of reference and intend no disrespect.

2013. Alexis and Bellino were married throughout the time Alexis was a cast member of RHOC. Bellino was never a cast member of RHOC, but was occasionally featured. On June 21, 2018, Bellino filed for divorce from Alexis.

II. *Statements Made in Podcast*

On June 26, 2018, Judge and Beador appeared at the Irvine Improv comedy club to appear on the podcast the "Juicy Scoop" with Heather McDonald before a live audience. Part of the conversation involved the recent Bellino divorce. Judge said about the Bellinos, "I have a theory. Everything, everything's in her name. He's going to go to jail. Yeah, he's a shady motherfucker."

McDonald asked, "Do they still have the trampoline parks? Does anyone know?" The exchange continued as follows: "[Ms. Beador]: No. No. I heard that they don't. [¶] [Ms. McDonald]: They sold it? [¶] [Ms. Beador]: I heard they don't because they were sued. [¶] [Ms. McDonald]: So there wasn't, like, a lawsuit of someone that, that -- [¶] [Ms. Beador]: No, they were, they were sued. Kids . . . People [sic] get their . . . I won't let my kids go because people get paralyzed, and they, and apparently that happens."

III. *Bellino's Complaint Against Judge*

Plaintiffs' complaint pleaded six causes of action. Relevant to this appeal, the first cause of action for defamation per se (claim 1), was alleged by Bellino against Judge. Bellino alleged a cause of action for defamation against both defendants (claim 2). Plaintiffs asserted their fourth cause of action, false light (claim 4), against both Judge and Beador.

Claim 1 against Judge was captioned defamation per se. Bellino alleged, "On or around June 26, 2018, Judge made the following statement about . . . Bellino to numerous other persons (as many as 100 other persons, if not more): 'He is going to jail.'" He further asserted: "The persons who heard the foregoing statement reasonably

understood that it was about . . . Bellino and reasonably understood it to mean that . . . Bellino had committed a crime and was therefore 'going to jail.'"

Bellino concedes he filed his complaint on July 27, 2018, before he had obtained the audio video recording of the statements at issue and before he could determine the exact wording Judge used. The transcript of the event demonstrated the actual wording used was, "He's going to go to jail."

Claim 2 was against both Judge and Beador for defamation. With respect to Judge, Bellino asserted, "On or around June 26, 2018, Judge stated to numerous other persons (as many as 100 other persons, if not more) that . . . Bellino's divorce was 'fake' or a sham and that he was asking for spousal support because 'everything's in her [his wife's] name.'" He also claimed, "The persons who heard the foregoing statement reasonably understood that they were about . . . Bellino and reasonably understood them to mean that . . . Bellino's divorce proceedings were fraudulent and/or entered into for an improper purpose." Claim 4 was based upon the same defamatory statements alleged in claims 1 and 2.

IV. *Judge's Anti-SLAPP Motion*

In response to the complaint, Judge and Beador filed anti-SLAPP motions.[3] In support of her motion, Judge submitted an attorney declaration accompanied by 19 exhibits. The exhibits included nearly 200 pages of various screenshots from Web sites and online articles discussing RHOC and the Bellinos. Judge did not file a request for

[3] Beador's anti-SLAPP motion is the subject of another appeal. (*Bellino, et al. v. Beador* (Oct. 23, 2020, G057255) [nonpub. opn.]

judicial notice (RJN) in the trial court or on appeal. Beador's anti-SLAPP motion included a RJN.[4]

Before the hearing on the anti-SLAPP motion, Plaintiffs filed a motion to lift the anti-SLAPP discovery stay imposed by section 425.16. They sought limited discovery on the issue of actual malice. The trial court continued the hearing on the motion to be heard concurrently with the anti-SLAPP motion.

The trial court denied Judge's anti-SLAPP motion as to claim 1. It determined Judge met her burden on the first prong of the anti-SLAPP analysis, discussed in detail below, stating: "Given Bellino's ex-wife's role on the show as a 'housewife' of O.C., along with his appearance on the show as her husband, their divorce, including the nature of the divorce, would be a matter of public interest to those who watched the show. Bellino's character, and whether he is a convicted criminal, would be too. The court finds that the comments by Judge that Bellino is suing on are protected speech under [section 425.16, subdivision (e)(3)]."

The trial court then determined Bellino met his burden on the second prong of demonstrating a probability of prevailing on the merits. Specifically, the court rejected Judge's assertion the statement was a mere joke or opinion: "For defamation per se, Bellino points to Judge's statement that 'He is going to jail.' [¶] Judge does not address this statement separately from the others but argues that all of her comments are statements of nonactionable opinion rather than fact. But on its face[,] it is an assertion

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[4] Confusingly, the trial court ruled, "The parties' requests for judicial notice are granted." The only party that filed such a request, however, was Beador. It also stated, "For the reasons discussed in the RJN section, objections [to Beador's RJN] are overruled." The court's ruling, however, contained no RJN section. In any event, Bellino fails to demonstrate how this evidentiary mishap caused him prejudice. His pleadings and declaration, which this court relied upon, contained sufficient evidence to determine the statements were protected speech and to show he was a limited public figure. We admonish Judge for failing to follow the proper procedures set forth to seek judicial notice in the trial court and on appeal.

of fact and Judge does not provide any context that shows it to be merely an expression of opinion. Nor must it be taken as a joke. While Defendants describe the show as designed to be amusing and funny, there is no suggestion that the participants were simply doing a comedy routine. They were 'dishing' about the show's participants. Part of the amusement value was from the gossip—the relaying of juicy facts about themselves and others." The court also concluded Bellino was neither an all purpose nor limited purpose public figure and as a result, did not need to prove actual malice.

The court granted Judge's anti-SLAPP motion as to claim 2. It reasoned Bellino failed to present adequate evidence of special damages: "[T]he 'sham divorce' comments (if that is how they were to be understood) remain at best slander per quod subject to special proof of damages. Again, this is presumably why these statements are not alleged in the first cause of action for 'slander per se.' But here again, there is no evidence of damages with a nexus to this alleged 'slander per quod.' Instead, Bellino states that investors learning about the fact that 'he's going to jail' will no longer deal with him. [Citation.] This, is not evidence that the purported 'sham divorce' statements caused special injury."

The trial court determined claim 4 for false light invasion of privacy was "essentially superfluous" because it was coupled with a defamation claim. In sum, the court granted the motion as to claim 2, but denied it as to claims 1 and 4.

DISCUSSION

I. *Pertinent Anti-SLAPP Law and Standard of Review*

"'[Section] 425.16 sets out a procedure for striking complaints in harassing lawsuits that are commonly known as SLAPP suits . . . , which are brought to challenge the exercise of constitutionally protected free speech rights.' [Citation.] A cause of action arising from a person's act in furtherance of the 'right of petition or free speech under the [federal or state] Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established

that there is a probability' that the claim will prevail. (§ 425.16, subd. (b)(1).) 'The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity. Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. We have described this second step as a "summary-judgment-like procedure." [Citation.] The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.] "[C]laims with the requisite minimal merit may proceed."' [Citation.] 'We review de novo the grant or denial of an anti-SLAPP motion.' [Citation.] As to the second step inquiry, a plaintiff seeking to demonstrate the merit of the claim 'may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence.' [Citations.]" (*Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 940 (*Sweetwater*).)

II. *Claim 1*

A. *First Step: Protected Activity*

The trial court determined Judge met her burden as to the first prong of the anti-SLAPP analysis on claim 1. We agree.

The anti-SLAPP statute provides heightened procedural protection for a defendant's speech in only four categories, all of which must be "'in connection with a public issue.'" (§ 425.16, subd. (e)(1)-(4).) Judge's anti-SLAPP motion was based on sections 425.16, subdivision (e)(3) (category 3) and (e)(4) (category 4). Category 3

pertains to "statements or writing made in a place open to the public or a public forum[5] in connection with an issue of public interest." (§ 425.16, subd. (e)(3).) Category 4 applies to "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).) "'California cases establish that generally, "[a] public issue is implicated if the subject of the statement or activity underlying the claim (1) was a person or entity in the public eye; (2) could affect large numbers of people beyond the direct participants; or (3) involved a topic of widespread, public interest." [Citations.] . . .' [Citation.]" (*Albanese v. Menounos* (2013) 218 Cal.App.4th 923, 934 (*Albanese*).) However, ""'[A] matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest."'" (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 621.)

Bellino's arguments allege the comments were not a matter of public interest and Bellino was not in the public eye for purposes of those comments. Judge alleged, "Bellino, a well-known celebrity whose fame arose from his and his former wife's five years as participants on the widely watched reality television series . . . . Regularly appearing on the show catapulted [Bellino's] divorce from cast member Alexis . . . , his real estate dealings, and his legal troubles into the sphere of public interest." We agree with Judge, and the trial court, the public interest prong was satisfied.

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[5] Plaintiffs all but concede the public forum issue, "the dispositive issue under both categories 3 and 4 is whether the statements were made in connection with a public issue or an issue of public interest, irrespective of whether made in a public forum." There is nothing in the record to suggest the Irvine Improv was not sufficiently open to the general public to be considered a public forum. Furthermore, the interview was part of a podcast, published for free on the Internet. The public forum requirement was satisfied.

Albanese concerned a defamation action by a celebrity stylist against television personality Maria Menounos based on allegations Menounos falsely and publicly accused Albanese of theft. (*Albanese*, *supra*, 218 Cal.App.4th at p. 936.) The appellate court affirmed the denial of Menounos's anti-SLAPP motion, determining that even assuming Albanese was "rather well known in some circles for her work as a celebrity stylist and fashion expert, there is no evidence that the public is interested in this private dispute concerning her alleged theft of unknown items from Menounos . . . . In short, there is no evidence that any of the disputed remarks were topics of public interest." (*Ibid*.)

Albanese involved a private dispute between two people in the public eye. By contrast here, Bellino voluntarily appeared on a reality show based upon the participant's marriages, divorces, and their lifestyles. The trial court correctly analyzed whether Judge's comments were connected to Bellino's public persona as a matter of public interest. It provided the following reasoning: "The record shows that Bellino too has sought public attention—he has his own public [Web site] where he posts about some aspects of his life and he chose to appear, at least on some occasions, on the show. He has not sought such pervasive attention to all aspects of his life such that everything about him can reasonably be deemed in the public interest, however. [¶] Accordingly, the question is whether [Judge's] comments, or any of them, were connected to that part of Bellino . . . in the public interest. [¶] . . . [¶] Given Bellino's ex-wife's role on the show as a 'housewife' of O.C., along with his appearance on the show as her husband, their divorce, including the nature of the divorce, would be a matter of public interest to those who watched the show. Bellino's character, and whether he is a convicted criminal, would be too."

Instead, this situation more closely matches that of *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798 (*Seelig*). There, plaintiff appeared on the reality television show, Who Wants to Marry a Multimillionaire. (*Id*. at p. 801.)

The appellate court determined statements made on a radio show regarding a contestant's participation on Who Wants to Marry a Multimillionaire satisfied the public interest standard. It explained, "The offending comments arose in the context of an on-air discussion between the talk-radio cohosts and their on-air producer about a television show of significant interest to the public and the media. This program was a derivative of Who Wants to Be a Millionaire, which had proven successful in generating viewership and advertising revenue. Before and after its network broadcast, Who Wants to Marry a Multimillionaire generated considerable debate within the media on what its advent signified about the condition of American society. One concern focused on the sort of person willing to meet and marry a complete stranger on national television in exchange for the notoriety and financial rewards associated with the [s]how and the presumed millionaire lifestyle to be furnished by the groom. By having chosen to participate as a contestant in the [s]how, plaintiff voluntarily subjected herself to inevitable scrutiny and potential ridicule by the public and the media." (*Id*. at pp. 807-808, fn. and italics omitted.)

So, while a typical divorce proceeding, even of the rich and famous, may generally be a private matter, the Bellinos' lifestyle and divorce were fodder for public interest due to their participation on RHOC and the sprawling nature of the show into its participants' lives and marriages. The court did not err.

B. *Second Step: Probability of Prevailing*

The trial court determined Bellino carried his burden on the second prong. We agree.

To meet its burden on the second prong, a plaintiff must show the cause of action has "minimal merit." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89.) "Slander is a species of defamation. . . . 'A false and unprivileged *oral* communication attributing to a person specific misdeeds or certain unfavorable characteristics or qualities, or uttering certain other derogatory statements regarding a person, constitutes slander.'

[Citation.]" (*Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 867.) To prevail on a defamation claim, a plaintiff must show: defendant published the statement, the statement was about plaintiff, the statement was false, and the statement was defamatory; and, if the statement is not defamatory on its face, plaintiff suffered special damages. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369.) Statements that are defamatory on their face and do not require proof of special damages include, as relevant here, a false statement that: "Charges any person with crime, or with having been indicted, convicted, or punished for crime." (Civ. Code, § 46, subd. (1).)

Judge challenges the trial court's ruling on several fronts. We have consolidated the parties' lengthy briefing on this topic to three basic issues. First, Judge contends the trial court erred because it failed to cite the precise language used in the podcast and "going to go to jail," as opposed to "going to jail," does not contain a false statement of fact. Second, she asserts even if the phrase was defamatory, Bellino was required to prove special damages. Third and finally, she argues the court improperly determined Bellino was not a limited purpose public figure required to prove actual malice. We address each argument in turn.

i. *Statement at Issue*

The majority of Judge's briefing takes issue with the trial court's supposed confusion between the language pleaded by Bellino, "he is going to jail," with the language from the transcript of the podcast, "He's going to go to jail." She asserts the former is defamatory while the latter is not. We are unpersuaded.

The plaintiff in a slander case, "'is not required to reproduce with literal precision the identical words set forth in his complaint, but those which are proved to have been spoken must be in substance the same or have substantially the same meaning. . . .' [Citation.]" (*Albertini v. Schaefer* (1979) 97 Cal.App.3d 822, 830.) The phrases, "he is going to jail," and "[h]e's going to go to jail" have a substantially similar meaning. The trial court's order was not based on a "mistaken premise." While it referred to the

statement, "he is going to jail" in its order, we recognize the court had before it a recording of the statement, a transcript of the recording, and Bellino's declaration, which all quoted the statement verbatim.

In any event, Judge concedes she stated Bellino, is "going to go to jail. Yeah, he's a shady motherfucker." While the trial court may have failed to quote the correct statement in its order, this was harmless. As described in more detail below, we determine Bellino carried his burden on the second prong as to the phrase "[h]e's going to go to jail."

To determine whether the statements at issue are provably false factual assertions, the court employs a totality of the circumstances test. "'"'First, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense. . . . [¶] Next, the context in which the statement was made must be considered. . . . [¶] This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed."' [Citations.]" (*Seelig, supra,* 97 Cal.App.4th at pp. 809-810.)

Judge asserts the future tense of the statement demonstrates it is "inherently conditional and nonfactual because the future is uncertain." We reject the idea that couching slanderous statements in the future tense always precludes liability. Instead, each case must be viewed in the total of circumstances.

First, the words are reasonably understood in a defamatory sense. Judge stated: "Why is, why is [Bellino] wanting spousal support? [¶] . . . [¶] I have a theory. Everything, everything's in her name. He's going to go to jail. Yeah, he's a shady motherfucker." Judge's use of "I have a theory" does not automatically prevent the words from being understood as defamatory. (See *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 19 [couching statements in terms of opinion does not dispel defamatory implications].)

Judge also claims the words in question are not fact based, but rather reflect Judge's "drunken . . . opinion of the values Bellino has and the choices he has made." She further contends, without legal or factual support, "Given that Bellino might yet land in jail, Judge's statement cannot—at this time—be proven true or false." In assessing the statement, "'"a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of the complaint for libelous publication according to its natural and popular construction." That is to say, the publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader. A defendant is liable for what is insinuated, as well as for what is stated explicitly. [Citation.]' [Citation]." (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 547.)

The defamatory implication is the Bellinos' divorce was somehow done fraudulently to shield assets in anticipation of a criminal prosecution. Specifically, the phrase "[h]e's going to go to jail," does not seem conditional or uncertain. It implies Bellino has already committed a crime. A reasonable fact finder could determine Judge was implying the provably false assertion of fact Bellino committed a crime and, as a result, was going to go to jail. Examining the remaining phrases reinforces rather than diffuses this impression on the listener, that Bellino is "a shady motherfucker."

The context in which the statements were made also fails to negate a defamatory sense. Judge's reliance on *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543 (*Polygram*), is misplaced. *Polygram* concerned a comedy performance by comedian Robin Williams. (*Id.* at pp. 545-546.) The complaint focused solely on a joke told by Williams at a nightclub. (*Id*. at p. 546.) The appellate court rejected the proposition "comedy is, virtually by definition, not taken seriously or literally." (*Id.* at p. 552, fn. omitted.) To the contrary, the court noted "the threshold inquiry is whether the communication in question could reasonably be understood in a

defamatory sense by those who received it. [Citation.]" (*Id*. at p. 554.) Ultimately, the court determined because the claims were all based upon publication of a joke, no liability attached. (*Id.* at p. 558.)

To be blunt, Judge is no Robin Williams. While the event took place at the Irvine Improv, Judge was not there as a comedic act. Instead, she participated in an interview with a podcast host. This format, although punctuated by swills of champagne, implied some factual information would be exchanged. Indeed, it was presumably Judge's inside knowledge of the Bellinos and other current and former RHOC cast members that was the draw. Judge contends, "in the context of a pure gossip show—[she] merely offered catty comments concerning generalized wrongdoing associated with Bellino." Gossip is defined as a "rumor or report of an intimate nature." (Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/gossip> [as of Sept. 22, 2020].) This definition, however, does not necessarily imply the statements are not factual. The trial court properly found there was no evidence Judge was merely offering an opinion or joking. It correctly concluded Bellino demonstrated the requisite minimal merit for claim 1.

iii. *Special Damages*

Bellino asserts claim 1 constituted defamation per se under Civil Code section 46, subdivision (1). Judge contends the phrase does not fit within the statutory meaning of Civil Code section 46, subdivision (1), and as a result, claim 1 at best alleged defamation per quod requiring proof of special damages. We disagree.

Civil Code section 46, provides: "Slander is a false and unprivileged publication, orally uttered . . . which: [¶] 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime[.]" (Civ. Code, § 46, subd. (1).) As discussed previously, Judge's statement, on its face, could reasonably be interpreted as Bellino having been indicted or convicted of a crime, for which he was about to be punished. Judge provides no context as to why it was merely an expression of opinion.

As explained above, stating "I have a theory" or claiming the entire interview was comedic in nature are insufficient. A reasonable listener could determine Bellino was accused of a crime, for which he was "going to go to jail." The trial court correctly concluded this statement fit within the statutory definition of slander per se and as such, Bellino was not required to prove special damages as to claim 1.

iv. *Public Figure and Actual Malice*

Judge contends the trial court erred by determining Bellino was not a public figure. She asserts Bellino's status as a public figure required him to demonstrate actual malice to carry the burden on his prima facie showing. We agree with Judge that Bellino was a limited public figure. However, Bellino made a prima facie showing of actual malice.

If the plaintiff in a defamation case is a public figure or limited public figure, he or she must also prove actual malice, meaning the defendant made the defamatory statements knowing they were false or with doubts as to their truth. (*Masson v. New Yorker Magazine* (1991) 501 U.S. 496, 510.) There are two types of public figures, an "all purpose" public figure and a "limited purpose" public figure. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345 (*Gertz*.)) The all purpose public figure is one who has "achiev[ed] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." (*Id.* at p. 351.) The second is the limited purpose public figure who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." (*Id.* at p. 351.) "Unlike the 'all purpose' public figure, the 'limited purpose' public figure loses certain protection for his reputation only to the extent that the allegedly defamatory communication relates to his role in a public controversy." (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 253-254 (*Readers Digest*).) "[W]hen called upon to make a determination of public figure status, courts should look for evidence of

affirmative actions by which purported 'public figures' have thrust themselves into the forefront of particular public controversies." (*Id.* at pp. 254-255.)

First, there is no evidence to support a finding Bellino is an all purpose public figure. The trial court correctly concluded Bellino's limited participation in RHOC years prior did not support a finding he had achieved the requisite "pervasive fame or notoriety." (*Reader's Digest*, *supra*, 37 Cal.3d at p. 253.)

Next, Judge contends Bellino was at least a limited public figure because he injected himself into a public controversy by voluntarily appearing on RHOC, where the subject matter was his actual life. Bellino contends his "'cause celebre'" divorce proceeding was not a public controversy. (*Time, Inc. v. Firestone* (1976) 424 U.S. 448, 454 (*Firestone*) [holding divorce of extremely wealthy person did not in and of itself constitute public controversy sufficient to cast divorcée as public figure.].) Judge, however, defines the public controversy not in terms of the Bellinos' divorce, but rather as follows: the "widespread debate about the enormous role that reality television has taken in visual entertainment, media culture, and modern society;" "whether 'reality' television is a misnomer because the shows are scripted and edited to tell a story, thereby encouraging dramatic engagement with the show's characters;" and "the extent to which the characters can be said to be 'real,' i.e., whether their problems are real, whether their love is real, whether their wealth is real. Indeed, there is also debate about whether their celebrity is real—or, whether they are just 'famous for being famous.'"

The facts here illustrate this last point. Indeed, a new word, "bravolebrity," was coined specifically to describe "someone who is famous only for being on a *Bravo* reality TV show, such as from their hit franchise *The Real Housewives*." ("Bravolebrity," www.dictionary.com, <http://www.dictionary.com/e/pop-culture/bravolebrity/> (as of Sept. 21, 2020.).) Judge's comments fall within the broader debate about reality television and its personalities. (E.g., Babendir, *Stop feeling embarrassed by how much you love reality TV* (May 14, 2018) The Washington Post

<http://www.washingtonpost.com/entertainment/books/stop-feeling-embarrassed-by-how-much-you-love-reality-tv/2018/05/14/3c550e5c-579f-11e8-8836-a4a123c359ab_story.html> (as of Sept. 21, 2020) (book review discussing reality television, what it is, how it is made, and what it means).) As explained in Dr. Melanie Greenberg's article for *Psychology Today*, this particular controversy also invokes viewers' mixed emotions about the voyeuristic delight they take in the subjects. (Greenberg, *Why We Can't Stop Watching 'The Real Housewives': Why We're Fascinated by the Drama & Decadence of Reality Television* (Mar. 19, 2013) *Psychology Today* <http://www.psychologytoday.com/us/blog/the-mindful-self-express/201303/why-we-cant-stop-watching-the-real-housewives> (as of Sept. 21, 2020.) A public controversy existed.

Bellino also intentionally and voluntarily entered into the public eye. He was occasionally featured on RHOC, even if not a cast member. Bellino's deliberate actions distinguish this case from *Firestone*. The divorcée in Firestone took no purposeful and deliberate action to enter the public sphere other than to hold a few press conferences to respond to charges made against her in the divorce proceedings. (*Firestone*, *supra*, 424 U.S. at p. 485.)

By contrast here, Bellino decided to become a recurring character on a successful television show. Because of his choice, issues relating to his domestic life became a subject of ongoing public interest to fans of the show. Bellino also concedes the former couple responded to media inquiries and made statements about their split to media outlets. We recognize "'those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.' [Citation.]" (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1133.) But Bellino was already a limited public figure before this controversy erupted. Indeed, Bellino's concession he made statements to media outlets is further evidence he was a public figure because he

possessed increased access to the media to help protect any adverse impact on his reputation. (*Gertz, supra*, 418 U.S at p. 344.)

To prevail on a defamation action, "public figures must prove, by clear and convincing evidence, that the libelous statement was made with actual malice—with knowledge that it was false or with reckless disregard for the truth. [Citation.]" (*Sipple v. Foundation For Nat. Progress* (1999) 71 Cal.App.4th 226, 247.) "Actual malice may not be inferred solely from evidence of personal spite, ill will, or bad motive. [Citation.] Similarly, mere failure to investigate the truthfulness of a statement, even when a reasonably prudent person would have done so, is insufficient. [Citation.] Although these factors may provide circumstantial evidence of actual malice in appropriate cases, their significance will vary depending on the extent to which they reflect on the defendant's subjective state of mind. [Citation.]" (*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1169.) "In the context of an anti-SLAPP suit motion, the limited public figure who sues for defamation must establish a probability that he or she can produce such clear and convincing evidence. [Citation.]" (*Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 700.)

Bellino's declaration in support of his opposition to the anti-SLAPP motion constituted prima facie evidence demonstrating Judge made the comments in reckless disregard of the truth. Bellino presented evidence of rivalry, ill will, and hostility between the parties, as well as prior defamation, wherein he was falsely accused of being a cocaine dealer by Judge. He also presented circumstantial evidence of Judge's decision not to acquire facts that could have confirmed the falsity of her charges. During the podcast interview, Judge referred to text messages exchanged beforehand in which McDonald asked, "'do you think [it's] possible that he's in trouble and she can't testify against him if he's trouble and all that stuff? and I'm like, "Oh, that's a whole other story!'"" A fact finder could reasonably adduce Judge decided not to acquire information before the interview that would have answered that question and confirm whether Bellino

was, in fact, "in trouble." That, in combination with the evidence of prior ill will between the parties, was sufficient to make a prima facie showing of actual malice at this early stage in the proceedings without the benefit of discovery.[6]

We also agree with the court that claim 4 for false light invasion of privacy mirrored claim 1. "When a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action. [Citations.]" (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1385, fn. 13.) Accordingly, the court correctly concluded Bellino demonstrated the requisite minimal merit for claim 4 at this point in the proceedings.

III. *Claim 2*

The trial court dismissed claim 2 for defamation, concluding Bellino presented inadequate evidence of a "nexus" between Judge's statements regarding his divorce and his special damages. Specifically, the court determined, "the 'sham divorce' comments (if that is how they were to be understood) remain at best slander per quod subject to special proof of damages. Again, this is presumably why these statements are not alleged in the first cause of action for 'slander per se.' But here again, there is no evidence of damages with a nexus to this alleged 'slander per quod.' Instead, Bellino states that investors learning about the fact that 'he's going to jail' will no longer deal with him. [Citation.] This, is not evidence that the purported 'sham divorce' statements caused special injury." We agree with the trial court.

Civil Code section 46 provides, "'Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which: [¶] 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime; [¶] 2. Imputes in him the present existence of an

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[6] Indeed, Bellino sought limited discovery on the actual malice issue, which was denied as moot by the trial court because it determined he was not a public figure.

infectious, contagious, or loathsome disease; [¶] 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits; [¶] 4. Imputes to him impotence or a want of chastity; or [¶] 5. Which, by natural consequence, causes actual damage." "A slander that falls within the first four subdivisions of Civil Code section 46 is slander per se and require no proof of actual damages. [Citation.] A slander that does not fit into those four subdivisions is slander per quod, and special damages are required for there to be any recovery for that slander. [Citation.]" (*Regalia v. The Nethercutt Collection* (2009) 172 Cal.App.4th 361, 367.) Bellino fails to demonstrate how the "sham divorce" comment clearly conveyed a meaning within one of the statutory categories that are actionable per se. As a result, it was defamatory per quod, requiring Bellino plead and prove special damages.

Bellino's alleged injury as a result of the defamatory statements was he "had the opportunity to purchase three trampoline parks before Judge's statements were made." He claimed the following: "This opportunity would have been extremely profitable for me. After learning of Judge's statements, the sellers and investors related to this deal were no longer interested in dealing with me. I make money by getting investors to invest in deals. Now the individuals that normally invest with me will not invest because they have heard and read that I am a 'shady motherfucker' that is going to go to jail." Taking Bellino's declaration as true, he fails to tie his damages to the defamatory statements alleged in claim 2, "that . . . Bellino's divorce was 'fake' or a

sham and that he was asking for spousal support because 'everything's in her . . . name.'" Bellino failed to provide evidence of the required element of special damages.[7]

Bellino's assertion that *Sweetwater* requires reversal is without merit. (*Sweetwater, supra*, 6 Cal.5th at p. 940.) The *Sweetwater* court determined, in the context of pre-trial motions, reliability stems not from the parameters of the hearsay rule, but "from the oath-taking procedures required for affidavits, or the execution under penalty of California perjury laws required by declarations. [Citations.]" (*Id*. at p. 944.) "It would not serve the purposes of the SLAPP Act to preclude consideration of testimony made under oath." (*Id.* at p. 943.) Here, however, the trial court took issue not with the hearsay nature of the declaration, but with the lack of a nexus even if the statement was considered true. The trial court properly granted Judge's anti-SLAPP motion as to claim 2.

[7] During oral argument, counsel for Bellino appeared to insinuate Judge failed to object to the lack of evidence of special damages. Because it was Bellino's burden to plead and prove special damages, such an objection from Judge was not required.

DISPOSITION

The trial court's order denying Judge's anti-SLAPP motion as to claims 1 and 4 is affirmed. The court's order granting Judge's anti-SLAPP motion as to claim 2 is also affirmed. Each party shall bear their own costs on appeal.

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

GOETHALS, J.